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TERESA OLCOTT COHEA
LEGISLATIVE FISCAL ANALYST

September 15, 1992

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TO: Legislative Finance Committee

FROM: Lisa Smith
Associate Fiscal Analyst

RE: Natural Resource Damage Assessment/General Fund Loan

This report provides an update on the natural resource damage assessment (NRDA) in the Clark Fork River Basin and the current status of the general fund loan to the Department of Health and Environmental Sciences (DHES).

In 1983, the state filed suit against Atlantic Richfield Corporation (ARCO) under the federal Comprehensive Environment Response, Compensation and Liability Act (CERCLA) for damages to natural resources from the release of hazardous substances in the Clark Fork Basin. These alleged damages resulted primarily from the Anaconda Company's operations during the last century. Because ARCO purchased Anaconda Company properties, it became responsible under federal law for any natural resource damages that might have occurred. While the state's original suit sought $50 million as the maximum allowable damages, the federal law was amended in 1986 to allow much higher damages recoveries.

Litigation under this federal law requires the state to prepare a natural resource damage assessment, estimating the total economic damages caused by injuries to natural resources from the release of hazardous substances.

The NRDA has three phases:

1) Phase I--Preliminary Assessment and Detailed Research Plan
2) Phase II--Detailed Scientific and Economic Investigations
3) Phase III--NRDA Support to Litigation

The department has completed Phase I and is currently in Phase II which involves detailed scientific and economic investigations and has three components: management support, physical injury assessment studies and economic valuation studies. All technical studies and resource valuations will be completed in this

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phase. The DHES plans to conclude this phase by April 1993. Phase III is ongoing and involves the litigation aspect of the Clark Fork Basin suit.

According to the court's schedule, DHES staff believe the case should be settled by April 28, 1995. If the case is not settled by this date, the Final Pretrial Order will be filed May 15, 1995 and the judge will set a trial date. If the case goes to trial, it would not be decided until fiscal 1996 or 1997, according to DHES estimates.

DHES staff state it is in the best interest of both parties to settle this suit prior to trial to avoid excessive litigation costs. However, the state's position is that any settlement will result in full compensation for damages. If not, the state will be prepared to go to trial.

The settlement will include the cost of the NRDA. Any damages collected must, according to federal law, be used to restore, replace or acquire equivalent natural resources.

The 1987 legislature appropriated $200,000 of resource indemnity trust (RIT) interest to DHES for costs incurred in pursuing this suit or others that might be filed under CERCLA. With these funds, a Denver law firm was hired to assist DHES lawyers working on the suit. During the period April 1988 through April 1990, DHES paid this firm $619,350. These costs were funded with the 1989 biennium RIT appropriation, $370,000 from the environmental quality protection fund, and a portion of the fiscal 1990 appropriation. The 1989 legislature appropriated $400,000 in RIT interest to DHES to continue this effort.

The 1991 legislature authorized a state special revenue biennial appropriation of $4,908,049 to continue the natural resources lawsuit against ARCO. The source of the state special revenue is a general fund loan. The legislature authorized DHES to receive an interentity loan from the general fund during the 1993 biennium to pay for the NRDA and litigation costs. This includes funding for 8 FTE in fiscal 1992 and 9 FTE in fiscal 1993. Currently, 8 of the authorized positions are filled and the department is advertising to fill the remaining position. The loan is to be repaid with interest, from amounts recovered by the lawsuit. As of September 1, 1992, the amount borrowed from the general fund was $2,800,000.

According to the department, the $4.9 million general fund loan is adequate to fund completion of the assessment and the litigation costs through fiscal 1993. The department plans to request additional funding in the next biennium to continue the litigation process (Phase III) in preparation for trial or settlement.

Total expenditures from the state special account through September 1 were $2,519,778. Over 85 percent of this amount is in the "other services"

category. "Other services" include legal services, environmental assessments and consulting services necessary to perform technical and economic studies and valuations. The remaining 15 percent of expenditures were incurred to pay the cost of personal services, equipment and other operating expenses. Fifty-one percent of the appropriation was spent as of September 1. However, total encumbrances are $1,741,435, so $4,261,213 or 86 percent of the total appropriation has been spent or obligated.

Section 17-2-107, MCA, states that a loan made under this section must be repaid within one calendar year of the date the loan is approved unless it is extended by the director of the Department of Administration due to unusual circumstances or by specific legislative authorization. The current general fund loan is authorized by the legislature through fiscal 1993. The department does not anticipate repaying the loan until the case is settled, possibly in fiscal 1995 or as late as fiscal 1997. Therefore, legislative action will be necessary to extend this loan through the 1995 biennium.

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